OPPRESSION
UNDER THE COLOUR OF LAW;
OR,
Mr LORD HERCARSE
HIS NEW
PRATICKS

As a Way-marke for Peaceable SUBJECTS to be ware of Pleying with a hot Spirited Lord of the Session, so far as is Possible when Arbitrarie Government is in the Dominion.

PROVERBS 20. verse 21.

An Inheritance may be gotten hastily at the beginning, but the end thereof shall not be Blessed.

Published by Mr. *ROBERT PITTILLOH*, Advocat.

LONDON,
Printed in the Year MDCLXXXIX.

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My Lord HERCARSE his New Practicks;

Publiſhed by Mr. *Robert Pittilloch Advocat.*

As a way to make for Peaceable Subjects to beware of pleying with a hot Spirited Lord of the Seſſion, ſo far as poſſible, when Arbitrary Government is in the Dominion.

Proverbs 20. verſe 21.

An inheritance may be gotten haſtily at the beginning, but the end ſhall not be bleſſed.

WHiles in my Solitary thoughts, I began to conſider the Nature of Juſtice, (which conſiſts in *individuo*) reckoned by the Learned among the principal Cardinal Vertues, and of Judgement, which is the Lords, and of the long tract of Judicial ſentences paſt againſt me, in an Affair depending againſt me, at the inſtance of *Alexander Ayton* of *Inchdarnie*, or rather at the inſtance of Sir *Roger Hoge*, perſonated by *Inchdarnie* his Son in Law, and how the weakneſs of my Judgment could not comply with the ſaid Procedour as juſt and juſtifiable either in the Root or Branch: I conceived it moſt agreeable to my Duty, to expoſe the ſame to the view of the World, that perſons judicious and impartial may either convince me to a full Submiſſion, if I be wrong, or the Authors of my ſuffering to change their courſe; Seeing in the multitude of Counſelours there is Stability: And as that Noble young Man, *Elihu* ſaid, *Wiſdom is not alwayes with the Ancient, nor underſtanding with the Men of days, but there is a ſpirit in Man, and the inſpiration of the Almighty giveth knowledge.* However, ſeeing he that doth Truth comes to the Light, that his deeds may be made manifeſt, they are wrought in GOD. I hope none has reaſon to be offended with the open and plain laying forth of the Truth in this matter.

And therefore to come to the purpoſe, The caſe is thus, in *Anno* 1648 Lieutenant General *Ruthven* then Heritor of the lands of *Killernie*, and *Andrew Wardlaw* appearand Heir to the ſaids Lands, and Reverſer upon the payment of 17500 Merks *Scots* borrowed from *Archibald Stuart*

Stuart Brother German to the then Laird of *Roſeſyth* 6000 Merks, and from *Alexander* his Brother 4000 Merks, for which the ſaid Leiutenant General, *Andrew Wardlaw* the Appearand Heir, and *Margaret Wardlaw* his Siſter, then Spouſe to the ſaid Leiutenant General, gave to each of them an heritable Bond, Oblieging themſelves conjunctly and ſeverally to make payment to them of the ſaid Sums, and all current Annual Rents; And for their better ſecurity, oblieged themſelves with one Conſent and Aſſent, to Inſeft each of them, in an Annual Rent correſponding to their reſpective ſums, to be uplifted forth of the ſaids Lands. Hereupon by vertue of the preceps contained in them, the ſaid two Brethren obtained themſelves inſeſt ſeverally in the ſaids Lands, the 26 of *May* thereafter; And received from Leiutenant General *Ruthven*, one years Annual rent of the ſaid ſums, from the date of the Bond, till *Whitſunday* 1649. *Margaret Wardlaw* her Husband dying ſhortly thereafter, *Andrew Wardlaw* the Reverſer entered in poſſeſſion of the whole Eſtate, by the tollerance of the two Brothers Creditors; the Law being patent to them to have exacted their Annual Rents, in regard *Margaret Wardlaw* the Conjunct Fiar was unwilling to ſtop them; and *Andrew Wardlaw* her Brother had no pretence to impede them. But the ſaid two Brothers complying with *Andrew Wardlaw*, and intending to bend all their forces againſt *Margaret* the Conjunct Fiar, charged *William Ruthven* lawful Son and appearand Heir to Leiutenant General *Ruthven* to enter Heir to his Father, and ſhe obtained Decreet againſt him: They charged *Margaret Wardlaw* then a Widow, to make payment to them of the principal Sumes, bygone Annual Rents, and Penalty; And likewiſe, they charged *Andrew Wardlaw*, but never inſiſted againſt him, to the outmoſt Diligence, tho he never ſuſpended them, and was in poſſeſſion of the whole Eſtate But *Margaret Wardlaw* was forced both for her Son *William Ruthven*, and for her ſelf to ſuſpend their Charge; And ſo far was ſhe from impeding them to uplift the Annual Rents, that this is one of the principal Reaſons in her Suſpenſion, *That the Chargers were abundantly ſecured in their Annual Rents, by their Infeftments; and that they or ſome others in their names were in poſſeſſion.* Which ſhe had Reaſon to preſume upon the Tollerance abovementioned. And the Reaſons in her Sons is, *He being a Child, the Lands were patent, for appryzing, and he had no other means wherewith to ſatisfie them.*

The

The Sums being thus rendred moveable by the Charge given to *Andrew* and *Margaret Wardlaws*, perſonally oblieged to make payment; and the Decreet obtained againſt *William Ruthven* her Son: *Archibald Stuart* in *May* 1654, aſſigned his ſum to *Alexander* his Brother, Principal and Annual Rent and Penalty, with the whole Heads and Clauſes contained in his Bond, and Inſtrument of Seaſing following thereupon; Whereupon in *June* 1654, the ſaid *Alexander* appriſed the ſaids Lands, for Principal, Annual Rents, and Sherriff-Fie; and obtained himſelf Infeft upon his Appriſing under the great Seal; but never inſiſted either for their Annual Rents, or for Mails and Duties, ſo long as their Comorad *Andrew Wardlaw* was in poſſeſſion: Knowing that the Ground was lyable to them for their Annuals, and they being Young Men having no Charge but themſelves, living with their Mother, who entertained them on her Charity. Hereupon *Margaret Wardlaw* ſeing that a daily burden was running on upon her Conjunct-fie Lands; and that ſhe had got nothing, but was forced to live upon her Credit: Warned her Brother to remove, and at length after much Oppoſition obtained a Decreet of Removing againſt him, but never made uſe thereof till the year 1656, after that he and Mr. *Robert Pittilloch* her preſent Husband had ſeveral Friendly communings upon the Affair, And afterwards a full Submiſſion drawn betwixt them: Mr. *John Drummond* of *Lennoh* Arbitrator for him, and one *George Knox* then a publick Collector, Arbitrator for her, and Mr. *Robert Pittilloch* her preſent Husband. But upon ſight of her Claim, he and his Arbitrator brake up the Submiſſion *reinfecta*, whereupon at length ſhe was forced to put her Decreet in Execution, or otherwiſe to live perquire, and the Annual Rents to run on likewayes.

This being done, *Alexander Stewart* founding upon his Appryſing with Concourſe of her Brother, purſued her and her preſent Husband with all Rigour for Mails and Duties: Whereupon offer was made to him of a Localitie for his Annualrents during all the time of her Poſſeſſion, and in time comming; Which he refuſed to accept, unleſs we would ſatisfie him for all bygones, which (as they then told him) they judged moſt unreaſonable; in regard ſhe had gotten nothing her ſelf for the time bygone: And ſhe being but a Liferentrix, might dye before ever ſhe received as much as would ſatisfie their bygone Annualrents. And it is referred

to.

to the consideration of all Judicious Readers whither this was not a Rational offer, seing they had layen out of their Annualrents, not only through their own fault, (the Laws being patent) But also they themselves had concured with her Brother, to keep her of Possession, producing their rights to furnish him with Defences, and reason of Suspension against her. And as to the truth of it, it is testified by their own Decreet, obtained for proving the Tennor of a Dispositi n granted by *James Bailly* to Lieutenent General *Ruthven*; Wherein this is made use of, as one of their Reasons for proving that Tennor, That Mr. *Robert Pittilloch* offered them a Localitie for their Annualrents: But this being refused she was forced to raise a *Summonds of Reduction* against them of their Appr sing and whole grounds thereof, Whereupon in *December* 1658, she obtained a *Reduction, Reducing, Retreating and Anulling* the Bands whereupon the Appriſing is founded, in so far as they personally obl ge the said *Margaret Wardlaw* with all Decreets of Appryſings, Charters, Seasings, Decreets of removing following thereupon; But sustaining them, *Quoad* the real Right; in regard of her consent, to the Precept and Procuratrie for *Infeftment*. This being done, *Alexander* the Appryser never contraverted in his time, but the Appryſing was reduced *quo ad eam*, and persued for a poinding of the Ground, only for his Annualrents: In Opposition to which. *Margaret Wardlaw* the Defender and her present Husband, considering they might in Conscience and Equity, use all Legal Defences for stoping this Procedor, in respect of the offer of payment during her Possession, and that they themselves were the cause of there not being payed, First offered to improve their Executions which accordingly they did: Whereupon their Action was for a considerable time delayed, Thereafter the Process was lost, whereupon it delayed another while: After this *Archibald* died, and after him *Alexander*, thereafter Mr. *William Bailie* pretended an Interest, which if it had been sustained, would have destroyed the Interest both of Pursuers and Defenders, which was taken away by proving the Tennor of a Disposition, granted by his Father to *Lieutenent General Ruthven*, after this *Alexander* being dead, his Son *James Stewart* succeeded to him, and he not being satisfied with Annualrents, with concourse of his Mother *Katrine Drummond* his Tutrix pursued for Mails and Deuties: To which the Decreet of Reduction abovementioned was always opponed,

opponed, and as oft sustained: Yea when her Personal obligation was aledged to be fortified upon this ground, *Ob non repugnantiam.* It was repelled as a quible: The *Lords* finding it was not the duty of a wife to repugne her Husbands deeds. But after all this and a long tract of time; *James Stewart* and his Tutrix both died, whereupon the Heritable right founded upon the Appryſing fell in to *William Stewart* (now of *Roſſyth*) Cuſing German to *James*, and the bygone Annualrents to *Jean Stewart*, Lady *Inchdarnie* his Fathers Siſter, who aſſigned them to *Alexander Aiton* of *Inchdarnie* her ſon, and Son in Law to Sir *Roger Hoge* then Lord *Hereaſe*, one of the *Lords of Seſſion*. But before this right fell into them, at leaſt before it was declared, (the ſame being interrupeed by a long conteſt betwixt them and *Alexander Naiper*,) Mr. *Robert Pittilloh* and his Wife entered in terms of Agreement with *William Stewart* of *Roſſyth*, who had right to the expired Appryſing, and to all Annualrents that were due ſince the death of *James Stewart* his Cuſing German: Laying out to him the favourablenes of their condition, in that *Margaret Wardlaw* was both Conjunctfiar of the ſaids Lands by her firſt Husband, and Apparent Heir to them by her Father, who was Proprietar of them, which the ſaid Laird of *Roſſyth* reliſhed very well: And ſeveral times promiſed he ſhould never agree with any till we had the firſt offer. But we fearing that the Annualrents would be declared to belong to *Inchdarnie* Son in Law to a Lord of the *Seſſion*; who might do great things for him, (as it after fell out) were loath to give too much upon conſideration of this Danger: Whereupon we continued ſtill willing to the Bargain, but conferring upon the price for a long time, without any finall Agreement; till the right of the Annualrents came in *Inchdarnies* perſon: And then my *Lord Hereaſe*, ſent for Mr. *Robert Pittilloch*, entertaining him with fair Language enough, but withall with many pumping Queſtions anent the Lands of *Killernie* and the condition thereof: Which I confeſs I anſwered with more Ingenuitie then Prudence, conceiving at that time all he ſpoke to me had flowed from the like Principles; and among other things he mentioned to me agreement with him for the bygone Annualrents: To which I anſwered I could not agree as the caſe then ſtood for two Reaſons. *1ſt.* It would be an Homologating of *Roſſyths* Right. *2dly*, My wife being but an *Liferentrix* If I ſhould agree for the Annualrents without the Heritable Right; My Wife might

might die long before I were satisfied of what I should Deburse: But I was in terms with *Rossyth*, for the Heritable Right, and if he and I should agree for that, I would indeavour likewayes to agree for such Annualrents as were justly due; And in order thereto with all diligence met with *Rossyth*, and finally agreed with him, to give him 12000 *Merks* for his whole Interest, concerning which write was to be drawn with the first convenience; It being then late at night. After which a Gentleman of Credit and honesty, told me that to morrow thereafter, he overheard a Servant belonging to *Hercarse* saying to a friend of *Rossyths*, that their 10000 *Merks* was better then my 12000 *Merks*, indeavouring thereby to take the Bargain out of my hand. But conceaving it to be below any honest Man, and farr more below a *Lord of the Session*, to take such base and indirect methods, after I had told him I was in terms with *Rossyth* therefore: And after that the business was fully ended, with which he declared himself noways unsatisfied, as also my Son in Law *Mr. William Hoge* having ingenuously told him the same thing, adding, he hoped his Lordship would not play in our Game: Whereupon he gave him assurance he would not, but that he would cause his Son in Law quite as much as *Rossyth* had done and more, I slighted the Gentlemans Information and friendly Admonition altogether; However I went down to *Rossyth* and payed him a visite, in whom I found no change, only I observed *Innermey* and his *Lady* to abide close by him while I was in his companie, after which my Son in Law who was his Intimat, and had done him several special Services, went to him and desired that what was agreed upon might be drawn in Write; to whom his answer was. Do ye thing me so base and unworthie a Rascal as that I will alter what I have done. Whereupon we rested, not making great haste; But quickly thereafter we were alarmed with surprising News, that *My Lord Hercarse*, *Inchdarnie*, *Innermey*, and some others, had meet with *Rossyth* in *Widdow Thomsons* house, near his Lodging, and he had granted a Disposition to *Inchdarne* of his hail Right for the Heritage and all Annualrents whatsoever he had right to; which we find since verified by the Disposition granted to him, with consent of *Innermey*, *Scotstown* his Brother in Law, and his *Lady*, of the date the 10 of *December*, 1687. Whereupon he was Infeft the 29 of the said Moneth thereafter.

Some

Some Reflections upon this Bargain,

It is humblie offered to the Conſideration of the Judicious Reader, whither this was not Concuſſion in Uberiore forma *in this Buſſineſs?*

FOr clearing whereof, we are to conſider, 1*mo*. The qualities and Condition of *Roſſyth* the granter of this Diſpoſition. 2*do*. The qualities and Condition of *Inchdairnie* to whom the Diſpoſition was granted *formaliter*. 3*tio*. The Qualifications and Condition of my L. *Hercarſe*, Preſent, Advyſing, Perſwading, and bringing the Bargain to a Concluſion. As to the firſt, it is well known, *Roſſyth* is amongſt the moſt ancient Barrons in *Fife*, (if not the moſt ancient) and of a moſt Honourable Deſcent, and alſo a Gentleman who underſtands his own buſineſs conſiderably well. 2*do*, The Bargain he had made with me was not raſhaly contrived nor made uſe of upon a Surpriſal, but after many Conferrences and Friendly meetings had for the purpoſe at ſeveral of which, his Advocate Mr. *John Stewart* was preſent. 3*tio*, After it was cloſed the expreſſion abovementioned, which he uſed to my Son in Law, who had done him ſeveral ſingular Services, inſinuats he judged none but a baſe and unworthy Raſcal, would reſeil from a Buſſineſs ſo tullie ended and concluded: But laſtly it is to be conſidered he was a Gentleman in diſtreſs, and under many burdens of Debt to ſeveral Creditors, and he had one great Action depending before the Lords of Seſſion for a great Summ of Money, which would have much contributed for his relief, and concerning the delay whereof I have heard him often complain. As to the ſecond it is well known *Inchdairnie* was in no condition of himſelf to do him any Service; but only by my Lord *Hercarſe* his Father in Law, and it is well known he was neither ſo Skilful in Rhetorick, nor Fluent in Oratorie, that thereby he could effectuate any great Matter: But as to the third, it is as well known that my *Lord Hercarſe* is a Perſon who has been bred in Sciences from his Youth, Skilled in the Law, and

for his present Condition he was then a Lord of the Session, and reckoned among those of the first Magnitude, and a man of a most forward Inclination in Prosecuting of Bussines. whether for himself or his Friend; as also, he was a Lord of the Court of Justiciary, which was a Court most terrible to many in that day, and by which Court *Walter Stewart*, *Rossythes* neer Kinsman and appearand *Heir*, and several others in whom he had a special Interest were declared Fugitives. Which being Considered, it is offered to the Consideration of the Readers, whither this was not Concussion in the highest Degree? which by the Doctors of the Civil Law, is defined to be *Crimen quo sub pretextu potestatis quam quis habet terror injicitur pecuniæ vel rei alterius extorquendi causa, &c.* And if it be not a Concussion of the worst nature, in so far as hereby a Gentleman of Ancient Extract, great Credit and Honour, has been perswaded contrair to his Faith and Ingadgement to Violat his Obligation. So deliberately perfected and adhered to for some dayes therea ter. And in so far as it was likewise done contrair to the Laws of Gratitude, in so far as concerned *Mr. William Hoge*, for whose Children the purchase especially was made, for whose cause he often declared he wold give me a Thousand Merks down of the Pryce; And in so far as it was done by a Lord of the Seossin, who should have been a Pattern and Patron of Justice, and that accompanyed with the Circumstances abovementioned: And also whither herein there was not Money given by *Rossyth*, upon this power and terror injected? in so far as the Bargain was granted for a Thousand Merks less then *Mr Robert Pittilloch* should have given for it, besides an other Thousand merks which *Rossyth* declared he gave down, out of his respect to *Mr. William Hoge*; To all which may be added, such was his Confidence of Effectuating his Purpose, *Terrore suo*; *et plena potestate quam tunc habuit*, that the Summonds was raised, and execute, for the Annualrents in *Rossyths* name; before this Bargain was made, without his knowledge or consent as he declared to me himself several times but leaving this to the Judicious Reader; we proceed;

After this Bargain was ended, and the Summonds raised, and execute, in the name of *Rossyth* and *Inchdairnie*, My Lord sent for me the second time, and when I came to him, he asked me, if I would satisfie them now for the Heretable Right, and all the bygone Annualrents

Annualrents? To which I answered, looking upon this Motion as a Jeat, I had once bought it alreadie, and his Son in Law had taken it over my head; I had no mind to buy it the second time, and when I looked for a reply, carrying Reasons to Justifie the deed; All he said was, he had reason to doe for his own securitie; which my weakeness could not comprehend, to be any better Justification, then if a Robber with an empty purse, when he had taken one from his Neighbour, had told him, he behooved to do it for his own securitie, in as much as without Money he could not Travel: As likewise he told me, it would byd but one Bellum; which I looked upon as the highest of Threatnings, and therefore answered him with much Sobrietie, I could not help it; his Lordship knew the old Proverb, *There was never a Lord of the Session lost a cause, and there never one of their Bairns won one.* Thus having parted from him, the Summonds being execute both for Mails and Deuties, and for Annualrents, the Summonds for Poinding the Ground was called upon the 6 day, which was the day of Compeirance, contrair to the Pratick of the House; which is not to call till the day of Compeirance be past: But as to the other for Mails and Duties, it was never yet publickly called, in the ordinar manner, nor any of the two sent out to be seen for six dayes, conform to the Laws of the Kingdom, Acts of Sederunt, and immemorial practise in such cases: But *tam avide inhiarunt in legatum adventitium*, which had hapened to *Inchdarnie* in an unexpected manner; that a new course was invented for a sudden Dispatch of the business: *viz. Inchdarnie* gave in a Bill of Suspension, in name of the whole Tennants, enumerating them by their names; and amongst them one who was never a Tennant, *viz. Robert Douglas* Servant to *Agnes Templeman*, and setting down their particular Duties, and acknowledging, they were resting the same for the Terms of *Whitsunday* & *Mertimas* preceeding; and that they were to pay the same to any having best Right, but they were distressed by two several Parties, *&c.* Which Bill being given up to see, these Answers were given to it *verbatim*.

Prima, If this Bill of Suspension be granted, Writers to the *Signet* needs never hereafter to put in another reason of Suspension, but *sic volo sic jubeo*; In so far as in the first place, this Bill is given in by *Inchdarnie*, not only without the consent of the saids Tennents, but

after they have disowned and disclaimed the same; as prejudgeing them of all the Priviledges competent to them in an Ordinar Action which he has stated against them for the saids Mails and Duties: Which (as is humbly conceived) is a Forgerie, if not a Falset.

Secundo, This Bill Lybels the Tennents, as acknowledging they are resting their hail *Mertimass Duties*, and that they are willing to pay them to any of the saids Parties who shall be found to have best right thereto: Whereas they have truly payed them to the said *Margaret Wardlaw* and her Husband already, and received discharges therefore, who has been their Masters these 20. years bygone: And that before any diligence used by the other Party, to put them in *Malafide*, which (as is humbly conceived) ought likewayes to be looked upon as a second Forgerie.

Tertio, In this Bill the Tennents Duties are Lybelled, as acknowledged by them farr beyond what they are, and by some of them who pays no Dutie but two *Shearers in Harvest*, for their small parcel of Land, to be considerable sumes of Money; which (as is humbly conceived) is a third Forgerie.

And as to *Margaret Wardlaw* Conjunct-fiar of the saids Lands, and her Husband, if such a Bill should be past, *Inchdarnie* having devised this project, and prepared all his Instructions for *Summar* discussing; they are most unjustly surprised, and hereby defrauded of the ordinar terms, competent to them in an ordinar Action: Which is the more odious in the person of *Inchdarnie*, Because this is the first time that ever they heard he pretended an Interest in these Lands.

2dly, If such a Bill should be past, it puts them in a condition never to uplift their Mails and Duties, albeit they should loose the Arrestment; upon a meer Alledgance and pretence of persons who never yet shewed any right thereto: Whereby if any of the Tennents prove *lapsi bonis*, they are lost for ever.

And if it should be discussed upon the Bill, which *Inchdarnie* boasts he will obtain, it is a preparative of most dangerous consequence; contrair to Law or Pratick, to discuss *Heritable Rights*, in *prima instantia* upon an Bill of Suspension: And if this should be sustained all ordinar Actions of greatest concernment, may be brought from the *Bench* to the *Side Barr*, meerly upon a pretence, that the pursuer has a Competitor: Whereupon the Defender is defrauded both of his

his ordinary Dyets for proving his Defences: and the benefite of the Roll, ordained for the Leidges, that they may not be surpriſed in their juſt Defences competent to them in their ſeveral Actions. P it the Buſineſs was with the Son in Law of my *Lord Harcarſe*, which he was to finiſh with one *Bellum*; and none of the Anſwers were reſpected, and therefore we put in a Bill to the hail; Lords of the Tennor following;

MY *Lords of Counſel and Seſſion, unto your Lordſhips, humbly Means and Shaws, we your Servitors* Laurence Mudie, Adam Peacock, John Henderſon, *and the Remnant Tennents of* Killernie *and* Bandrum, *That where there is a Bill of Suſpenſion given in to your Lordſhips, (we know not by whom) upon an alledged Double poynding, wherein we are alledged to acknowledge we pay great Duties, far beyond what ever we were in uſe to make payment of, and that we are reſting our Mertimaſs Dutie for the year laſt paſt* 1687. *And that we alledge we are charged and purſued by* Margaret Wardlaw *and Mr.* Robert Pittilloh *her Husband, for the ſaids Mails and Duetie, albeit not reſting by us? Whereupon* Alexander Aiton *of* Inchdarnie *intends to found a Proceſs againſt us, and the ſaid Mr.* Robert Pittilloh *and his Spouſe our Maſters. It is humbly repreſented to your Lordſhips, that if the ſaid Bill ſhall be ſuſtained as the foundation of a Proceſs as ſaid is, albeit diſclaimed and diſowned by us under our hands, yet it will make faith againſt us in time coming, whereby in the firſt place we ſhall be found lyable in far greater Mails and Dueties then ever were due by us, and the Mertimaſs Dutie laſt paſt already payed by us, to the ruin of us and our poor Families.* Secondly, *We ſhall be found guilty of accuſing of our ſaids Maſters of the hight of Covetouſneſs, in requiring our Duetie twice for one Term, which is a crime ſuperſcribed by the higheſt of all Judges, with the Name and Title of* Idolatry, *whereof we never knew them guilty.*

Wherefore we humbly pray, that for preventing the utter ruin of our poor Fortunes, and our diſgrace in being purſued for ſlandring our Maſters with ſo horrid a Crime, your Lordſhips would cauſe deliver up to us that Bill of Suſpenſion, as our own proper Evident to be cancelled and deſtroyed. Or if Inchdarnie *ſhall be ſo far indulged that it ſhall be ſuſtained to him as a Foundation of a Proceſs, binding againſt us, and our Maſters above ſpecified, as ſaid is, he may be ordained to ſubſcrive the ſame before two witneſſes, and Judicially to abide thereat; that we may have the benefit of improving thereof*

with

with concourse of his Majesties Advocate ; *as false and forged as accords of the Law.*

This Bill being read to the hail Lords , the Deliverance on the back thereof , was written by the *Clerk* in theſe terms,

Edinburgh Feb: 14: 1688.

THe Lords haveing heard this Petition remit to the Ordinar , to whom the within Bill of Suſpenſion was preſented , to ordain the ſame to be given up to the Petitioners; or to be ſubſcrived by *Inchdairnie* or not as he ſhall find juſt. But my Lord Preſident refuſed to ſubſcrive it: Whereupon to morrow thereafter I waited upon his Lordſhip while he was upon the Bench; And after he had ended the Subſcriveing all his Interloquitors , and Subſcriveing the Deliverances upon other Bills , deſired his Lordſhip would Subſcrive this , ſhewing him the Ordinar would doe nothing on it, without his Subſcription: To which he anſwered,he remembered nothing of it , whereunto I replyed I was never known to be a Forger , and the Clerk whoſe carriage in all the Buſſineſs was honeſt, and impartial roſe up and owned it , whereupon he deſired me to move it to Morrow; and they would do ſomething in it: Which accordingly was done , and as I was informed , (for there was nothing put in Write) it was Verbalie recommended to my Lord *Drumcairn* , to whom the Bill was preſented. What the Reaſons of my Lord Preſidents refuſal were the Eminence of his Station and the Greatneſs of his Parts, forbids me by Conjecture to Determine, albeit in that day I judged it aſ much his Dutie , as it was mine to require it. However neither the one nor the other was granted, albeit the ſaid Bill was likewiſe diſclaimed by the Tennants publickly , their Advocate *Mr. William Hoge* in their name diſowning the ſame at the Barr ; But all was in vain,the Bill is ſuſtained: It was given in by my Lord *Hercarſe* his Son in Law. But becauſe neither the Anſwers given to the Bill of Suſpenſion , nor the Reaſons given in in the Tennants Bill were reſpected; wee ſhall add ſome few Reaſons further , which we conceive could not but be known to the Lords themſelves , *viz.* *1mo*, A Suſpenſion in its own nature is but a Dilatorie ſentence , as the word ſignifies , the deliverance

verance upon the Bill imports, and the Sentence at Diſcuſſing bears which is either, Finds the Letters orderly proceeded, or Suſpends the Letters ſimpliciter; and therefore where there is no charge the Suſpenſion is a Suſpending Nothing, and Nothing cannot be put to further Execution, if it be alledged his Rights gave him a ground of a Decreet; and therefore there was a charge in the Root, tho' there was no formal charge: It is anſwered, his rights were not then produced and judged of, and *de non entibus & non apparentibus idem datur judicium*: 2*do*, If it ſhall be ſuſtained that perſons may give in a Bill of Suſpenſion whither the Debitors will or not, then any malicious perſon at his pleaſure may give in a Bill for Suſpending the Creditor, to provock him unneceſſarly to diſtreſs the Debitor: Whereupon much trouble and diſtreſs might follow. If it be anſwered they have not an intereſt; it is replyed as formerly, whatſoever his Intereſt was, at that time when his Bill was ſuſtained it was not ſeen and conſidered by the Lords: But becauſe through the weaknes of my Capacity, which could not ſwallow the Declarations and Teſts which other of profounder Judgments received with full Satisfaction, I have been many years out of Practiſe, in which the Lords might have made many Acts of Sederunt, which makes ſuch *Fictiones juris* lawful, and Practicable. We ſhall inſiſt no more on thir: Adding only two more, which are founded upon pure Nature, and theſe Principles which GOD hath implanted in all Mens hearts, The firſt is this Bill of Suſpenſion certainly ought not to have been ſuſtained for the ground of a Decreet, againſt any but ſuch as were Tennants in the Lands, to which *Inchdairnie* pretended right: 2*do*, Nor againſt them, for Sums or Duties which they were never reſting But ſo it is that upon this Bill, & finding the Letters orderly proceeded thereon; Decreet was paſt at leaſt againſt one who was never Tennent in theſe Lands, & againſt many of them for Sumes they were never due; Whereupon they were denunced, and upon Caption Incarcerat ten dayes in the Tolbooth of *Dunfermleng*; The Lords having no other Inſtruction, either who were Tennents, or what they were reſting, but *Inchdairnies* word therefore: Whoſe carriage truly was ſomewhat Scandelous when he came amongſt us, tho' his Authority was ſo great with the Lords: And if it ſhall be alledged to be the fault of the Writter who raiſed the Horning, It is anſwered, when a Bill was put in com-

complaining of the Writter, and craving he might be punished therefore, The Lords answer was, *Finds the Writer has done no wrong.* And therefore wee leave it to the Reader to consider, where the wrong lay. Whereas they found out a remeed afterward for Liquidation and proveing the quantities, it shall have an answer in its own place. But as yet there was never any thing invented, for succour of him who was no Tennent, seeing the order for the Tennents to compear and Depone, could never oblidge such as were no Tennents to compear and depone, nor can it in Reason be conceived, why the Decreet might not as well have passed against the whole Parioch, if *Inchdairnie* had lybelled them Tennants, the reason being one and the same as to one and to many.

But the Bill being sustained, tho the Lords were far advanced in their Roll of Suspensions; Yea so far that it would not have tempted any ordinar Mans patience, to have waited till it had come in in the ordinar Course, yet the reasons of this behoved to be discussed on the Bill; (it was to abide but one Bellum) for which a Bill was put in by *Inchdairnie* to the Lords, which received answer in these Termes.

January, 21 1688.

THe Lords discharges the Clerk to the Bills to expede the within mentioned Suspension, untill the Chargers be heard, before my Lord *Drumcairn*, Ordinar; to whom they remit to discusse the reasons of Suspension upon the Bill; By which deliverance (passing the Solesisme therein contained, in discharging the Clerk to expede the Bill who never had power to expede a Bill till it was passed by the Lords, and by the latter part of it makeing it impossible for either Lord or Clerk to expede it, in the notion of a Suspension; It being remitted to the Ordinar to discuss the reasons upon the Bill) *Inchdairnie* had these Advantages, 1*mo*, The choice of his own Lord, how much he followed my Lord *Hercarse* his Faith shall appear by what follows hereafter: 2*do*, Hereby he prejudged us of the benefit of the Roll, which by the Laws of the Kingdom, and Immemorial Pratick, is allowed to all the Leidges. 3*tio*, Hereby we were prejudged of the ordinar dyets, Competent to Defenders in pursuits for Mails and Deuties, in so far

far as upon the 25 of *Januarie*, we were ordained to ptoduce our Intereſts with Certification betwixt and the tenth of *Februarie* thereafter: Which was the allowing us but 16 dayes, which in all probability, if we had had the benefit of the Roll, and other Priviledges Competent to Defenders, in Actions for Mails and Dueties, would have been 16 Moneths; A great part of our righs being out of our hands, whereupon an incident diligence would have been granted us. But howſoever this being inacted, wee reſted ſecure, till an Act ſhould have been extracted, as has been the conſtant practiſe in all ſuch caſes, ever ſince the erection of the Colledge of Juſtice: Ane therefore we payed the Extracter to give us out a Scrol to ſee, before the ſame ſhould be Subſcrived. But the day being elapſed, the Ordinar called it upon the Bench, without any Act extracted; and becaule we did not inſtantly produce Decerned, preferring *Inchdarnie* to the Mails and Duties, whereupon we put in another Bill, of the Tenor following,

MY *Lords of Council and Seſſion, Unto your Lordſhips, Humbly Means and Shaws, we your Servitors* Margaret Wardlaw *Conjunct Fiar of the Lands of* Killernie, *and* Mr. Robert Pittilloch *her Husband, That whereas* Alexander Aitoun *of* Inchdarnie *having raiſed a ſummonds for Mails and Duties againſt our Tennants, after the day of Compearance was paſt, and Tennants and we were both ready to Anſwer, he changed the nature of his Action unto a Suſpenſion of double Poynding (as is humbly conceived) contrare to Law and Equity, hereby prejudging us of the priviledges allowed to all the Lieges, in ſuch caſes by Acts of Parliament, Acts of Sederunt, and immemorial Practik: Notwithſtanding hereof, we in an intire deference to your Lordſhips pleaſure, ſubmitted thereto, providing your Lordſhips would ordain him to ſubſcrive and abide by the ſaid Bill ſtuffed with calumnious untruths, prejudicial both to us and our Tennants, and therefore diſowned and diſclaimed by them. And that your Lordſhips would grant us and our Tennants the ſame priviledges, which in Law are allowed to all his Majeſties Subjects in purſutes for Mails and Duties, this being no other but the ſame Action* in omnibus mutato nomine. *Albeit as to the firſt, your Lordſhips referred the cauſing him ſubſcrive and abide by the Bill to the Ordinar to whom it was firſt preſented, there is nothing done therein, and as to the other, when after your Lordſhips had exacted us to produce our intereſts* hinc inde, *the tenth of* February, *in regard whereof, upon good and Legal*

Grounds,

Grounds, we rested secure till an Act should have been extracted, calling for a scroll thereof often in the Clerks Chamber, with a purpose to give ready obedience, in place thereof by an unusual surprisal, without an Act, we were ordained instantly to produce, which we could not do. And because we did it not, a Decreet was presently put up against us, in regard whereof, we humbly conceive it ought to be Declared by your Lordships, whether any Process ought to be sustained upon this Bill, before the Pursuer subscrive the same, and abide thereat. And 2dly, Whether your Lordships will sustain this for a practick, that where there is an Act passed, there can be either a Decreet of Preference or Circumduction of the Terme, before Extracting and Calling the Act? And if your Lordships find it can subsist with Law and Forme, we shall instantly produce.

Wherefore may it please your Lordships, to take the premises to your serious consideration, and to give us your positive Determination thereanent, and to Declare whether we and our Tennants shall have the privileges of other Defenders, pursued for Mails and Duties, or if the same shall be Arbitrarlie altered in favours of Inchdarnie, *because this Action hath gotten the name of a Suspension; And in the mean time to ordain the Decreet abovementioned to be expunged.*

The Deliverance and Answer whereunto, was in these Terms.

Edinburgh, Februarie 18th. 1688.

The Lords having heard this Bill, remits to the Ordinar, who passid the Bill of Suspension to allow the Petitioners a farder Terme to produce their Interest or not, as he shall find just.

If the Lords had refused or rejected this Bill, as frivolous and impertinent; it is like the Petitioners submitting to their Lordships Judgements, would have acquiesced. But as the things therein desired, are in themselves pregnant, and most pertinent, so the Lords implicitly at least, have approven them to be such: by giving them some thing like an answer; but in effect answering none of the particulars petitioned for in the Bill. For albeit it may be alleaged, that a farder Dyet was craved in this Bill; It is easily answered, that albeit by the granting the just desires of this Bill, it would have followed by Consequence, that a further Term would have been granted, yet this is no wayes the desire of the Bill; but 1*mo*, That *Inchdairnie* subscrive the Bill, and abide thereat, that a solid ground might

might be laid of an improbation against him for his Falset and Forgery. 2*do*, That the Circumduction of the Term might be declared Null; That so that Decreet might be turned into a Lybell: and no Circumduction might pass till an Act were Extracted, and called, conform to the Laws of the Kingdom. 3*tio*, That the Lords would declare, they would allow us the Priviledges due to other Defenders, in actions for Mails and Deuties: Or if the same should be Arbitrarly altered, in favours af *Inchdairnie*, because it has the name of a Suspension.

But all Petitions being in vain, we produced *Margaret Wardlaw* her seasin, bearing her to be infeft in the Lands above specified: Which was all the Rights we had in the Town at that time concerning these Lands. And *Inchdairnie* produced his Rights, founded on, whereupon we were ordained to see in the Clerks hands: tho' the ordinar Custome according to Law, and practice, is to send out the pursuers process, to the Defenders Advocate: Which he is not bound to return till six dayes be Elapsed, and the Defender is not tyed to produce his, till he propone thereupon, and if his Defence Founded upon his Interest be founded Relivant, a day is assigned to him, whereupon the Pursuer extracts an Act, and forces him to produce. But as to the Pursuers Production, we were only ordained to see in the Clerks hands, who refused to give it up without a receipt from our Advocate: Which being grented, before or a little after twenty four hours were elapsed; (a time scarce Competent to Inventar the many writes given in by the Pursuer) we were urged to deliver them back again: tho' ours is keept up to this day. *Inchdairnie* pretending it is his evident; And an Action of Removeing Depending against us; tho' this was the only evident we had whereupon to found a Defence; And albeit his Father in Law, and Procuror had declared; there should no such Action be pursued till it were given up, adding they were not so base, as to fight with a man when they had taken his Armes from him.

The production being thus satisfied, My Lord *Drumcairn* called it upon the Bench: Where my Lord *Hercarse* compeared with his Purple Gown, and debated the cause as *Inchdairnies* Advocat, repeating all his writs, it seems relying on the old Proverb, *Quum singula non prosunt, multa juvant.* But so far as I remember there past no *Decreet* that

day, but to morrow thereafter his Lordſhip calle it again, at the Side Bar; where my Lord *Hercarſt* compeared again, in his former habit, and the diſpute was renewed: in which diſpute, our Advocates would propone nothing as to the Annualrents, aledged due by the Inteſtments following upon the Heritable Bonds: Becauſe an Action for ſuch Annualrents, and an Action for Mails Deuties, are *toto cælo* different. 2*dly*, Becauſe there was nothing in *Libello*: There being nothing in the Bill of Suſpenſion, which was the ground of the Proceſs, but Mails and Deuties: But knowing there could be nothing in this proceſs for a ground of Mails and Duties, which are the Emolument of the property, but the Appriſing; This unanſwerable Defence was proponed: Offers to prove the Appriſing Reduced, *in foro contradictorio, quo ad Margaret Wardlaw*, the Conjunct-fiar, and tho they were bound to ſay no further; Yet *ex ſuper abundanti*, becauſe what he proponed upon a Back-bond of Reverſion, ſeemed to ſavour much of Natural Equity: It was anſwered, *primo*, This Back bond was granted by a Wife, *ſtante Matrimonio*, and under Reduction. 2*do*: Finding there was much weight laid upon it, we offered under proteſtation that it ſhould not be prejudicial to our Reduction, to Count and Reckon preſently, without an Order of Redemption; Albeit in Law without an Order, we were not tyed to Anſwer. To the firſt it was replyed, the Reduction is without prejudice of *Inchdarnies* Authors real Right, which *Inchdarnie* produced to clear the ſame, which was true as to the matter, but moſt impertinent as an anſwer to the Defence produced: It was not contraverted but their real Rights were valid; but they could never be a ground for Mails and Duties *in prima inſtantia*; nor any other Right they produced but the Appryſing, which the Defence abovementioned, did totally elied. But my Lord *Drumcairn* being ſtraitned with the Defence, anſwered himſelf, that our Reduction was but as to perſonal Execution againſt *Margaret Wardlaw*. To which I replyed my ſelf, my Lord, *The peril of the cauſe upon that*. And hear we deſire the Judicious Reader to conſider, whether the Ordinar who gave ſuch an Anſwer, had puruſed the proceſs, or if *implicita fide*, he had followed my Lord *Hercarſe* his Faith: ſeeing the very words of the Reduction are, *Finds the firſt Reaſon of Reduction relivant, and proven, to ſo far as concerns the perſonal Obligdment, and all that has followed, or may follow thereupon as Null; And therefore, Reduces, Retreats, Caſſis,*

Caſſis, and Annuls the ſaids Bands, in ſo far as they perſonally obliege the ſaid Margaret Wardlaw, *with all Decreets of Appriſings, Charters, Seaſings, Decreets of Removing following thereupon, Declaring the ſame to have been from the beginning, to be now and in all time coming Void, and of none Effect, quo ad eam, in ſo far as the ſamen are deduced againſt her, upon the foreſaid perſonal Obligement.* Likeas if his Lordſhips patience would have admitted us a Hearing, we could ſhewed him further, that ſhe ſtood in no need of a Security for her perſon; in regard the ſame was already ſufficiently ſecured, by a Suſpenſion ſtanding yet undiſcuſſed. To the ſecond, there was nothing anſwered, *But there was no Reduction produced*; which was an Anſwer of no value, it being time competent enough to produce it, at any time before the Count and Reckoning was ended: Eſpecially the ſame being offered, before uſeing an order of Redemption, or raiſing Declarator thereon. But my Lord without further anſwer, or heeding what was ſaid, decerned, and ſo went haſtily from the *Side Barr*, refuſing us the Lords Anſwer upon a Maund; which in Law is competent to all Subjects in the Kingdom.

Hereupon to morrow thereafter, I put in a Bill to the Lords, of the Tennor following:

MY *Lords of Council and Seſſion, unto your Lordſhips humbly Means and Shews; We your Servitors* Margaret Wardlaw, *Conjunct Fiar of the Lands of* Killernie *and* Bandrum, *and Mr.* Robert Pittilloch *Advocate, her Husband for his Intereſt. That whereas on* Friday *the* 24, *of this Inſtant, My Lord* Drumcairn *at the* Side Barr *paſt a Decreet in favours of* Inchdarnie, *preferring him to the Duties of the ſaids Lands: For the Demonſtrating the Iniquitie of this Sentance, Your Petitioners conceives it their duty, to Repreſent to your Lordſhips the whole tract of this Affair, which is as follows*, viz. Inchdarnie *having faln in by an unexpected Accident to ſome Mails and Duties alleged, reſting to* Alexander *and* Archbald Stewarts, *Uncles to the Laird of* Roſſyth, *and my Lord* Hercarſe *having ſent for the ſaid Mr.* Robert, *under pretence of Agreement therefore, and receved from him theſe Rational Anſwers: That he could not make any Agreement for any Mails and Duties, till he had agreed with* Roſſyth, *in whoſe perſon the Heritable Right ſtood, becauſe it would not only be an* Homologating *of* Roſſyths *Right, but the paying out of Mails and Duties for a* Liferentrix. *For the return whereof he had no aſſurance, by reaſon*

of

of the uncertaintie of her Life, and that he was in terms with Rosslyth, for the Heritable right in order to Agreement, for what Mails and Duties should be found due. In place of expecting the close of this Agreement which your Petitioners hastned, they being in terms before to this purpose, rationally to have satisfied his Lordship. Inchdarnie with concourse of my Lord Hercarse, his Father in Law, after your Petitioners had verbally agreed with Rosslyth, for the said heretable Right, and it was concluded it should be drawn in write with all possible conveniencie, caused him dispone his Right to his said Son in Law for a 1000. Merks Scots less then your Petitioner had agreed, for he having a great Action depending in the Session against my Lord Annandale; and knowing the great Figure Hercarse made amongst the Lords. 2ly. Having obtained this Right, his Son in Law raised Summonds against your Petitioners and their Tennants for Mails and Duties in which Action, we were most ready and willing to have answered him according to the Laws and practick of the Kingdom, but instead thereof, in an unusual manner, after the day of Compearance was past, he raised a Suspension of double Poynding in the Tennants names, which (as we are informed by able Lawyers, was never sustained but in favours of Suspenders really distressed by Chargers to be discussed upon a Bill, when they could not find caution: Farr less at the instance of the Pursuers, when the alledged Suspenders disclaimed and disowned the same, under their hands. As also, your Petitioners alledged Chargers on the other part, Disowned the same. 3dly. When the saids Tennants did put in a Bill, Craving, That in regard they had disowned the same, and that it was filled with calumnious untruths, it might be either given up to them, as their own proper Evident, to be cancelled; or at least Inchdarnie might be ordained to subscrive the same before witnesses, and formaliter abide thereat, whereby they are prejudged of their Improbation, the remedie of Law in such cases. 4ly. That in all Actions for Mails and Duties (of which nature this is mutato solummodo nomine) no Decreet can in Law be pronounced where a terme is assigned for producing an Interest for disobedience, till an Act be Extracted and after Extracting, Called, and the Terme Circumduced for not Production; Yet in this Action before an Act was Extracted, a Decreet was pronounced, while your Petitioners upon Legal grounds rested secure, and had given money to the Extracter for a sight of a scroll of the Act, when it was called by their Adversary, my Lord Drumcairn, past a Decreet of Preference in favours of Inchdarnie. 5thly. His Lordship upon an Address made to him since we produced Margaret Wardlaws Infesment, having called this Action

again

again, we proponed an unanſwerable Defence, why Inchdarnie *could not be preferred,* viz. *That the Appryſing which was the ground of all, the Proceſs was reduced* quo ad Margaret Wardlaw, *My Lord* Hercarſe *Procurator for* Inchdarnie *anſwered, that our Reduction did not prove our Alledgance, and that he would produce the ſame himſelf, and added that there was an Backband of Reverſion granted to* Andrew Wardlaw, *whoſe Right ſtood in* Inchdarnies *perſon, which made it appear that* Margaret Wardlaw *is payed, for all that ſhe could crave out of this Eſtate: To which it was replyed, that the Defence being unqueſtionably Relevant, the probation ought to admitted to the Proponer, at leaſt if he produced the Decreet of Reduction, which was made uſe of for proving our Defence, we ought to ſee and be heard to object againſt it. And as to the Band of Reverſion, it was anſwered it was granted by her ſtante* Matrimonio *meerly for Love and Favour, and under Reduction long after ſhe ſtood publickly infeft.* Laſtly, *My Lord* Drumcairn *having called this Action again after he had taken the Diſpute above mentioned to a* viſandum, *My Lord* Hercarſe *ſtill compearing as Procurator for his Son in Law (a Practick without a paralel) without giving us a ſight of the Decreet they produced to object againſt it or admitting us Accompt or Reckoning in reference to the Reverſion, which we offered under proteſtation it ſhould not be prejudicial to our Reduction, ſtill decerned according to the deſire of My Lord* Hercarſe, Inchdarnies *Procurator, prefering him to the Mails and Duties.*

Wherefore we humbly pray that your Lordſhips for ſhunning the guilt of an unjuſt Sentence, and for vindicating your own Honours before the World, would ſeriouſly conſider the Conſuſſions, the overhailings, the Injuries, the Illegalities, and Informalities of the ſaid Proceſs, and particulars deduced therein, tending to the ruin of your Petitioners, without any free hearing or the benefit which by the Laws of the Kingdom is allowed to all his Majeſties Subjects, and diſcharge the Extracting of any ſuch Decreet, till your Petitioners be heard fully and freely to debate their Intereſts as others his Majeſties Subjects uſes to be heard in ſuch caſes.

This Bill being read to the Lords, It is given up to my Lord *Hercarſe* to ſee: Who (as is informed) went to the Kings Advocat, and conſulted it, to make up a ſtrong Accuſation againſt the ingiver: Who was appointed to anſwer to the Bill on *Tueſday* thereafter, upon which the ſame being called the ſaid day, in the Afternoon, the Lords gave their Deliverance in thir Terms:

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The Lords finds the Representations contained in the said Bill Calumnious, and therefore refuses the desire of the said Supplication, and ordains Macers *and* Messangers at Arms, *to apprehend the said Mr.* Robert, *and incarcerat his Person till further Order.*

Which Sentence in this was the more grievous, that it was passed the Penult day of the Session, so that if he had been Apprehended on the morrow thereafter, he must have lyen in Prison till the sitting down of the next Session, being the first of *June*, seeing no one Lord nor three would have taken upon them to have inlarged him. But taking this Deliverance into my serious consideration, I found it *1st.* Generally finding the Representations contained in the Bill Calumnious: And I humbly conceive, there are some of them, which my Lord *Hercarse* himself will not averr to be Calumnious: *2dly*, I found there was no mention of the latter part of the deliverance, anent my imprisonment, mentioned in the Decreet, when the said Deliverance is repeated for fortifying thereof. *Lastly*, I find none of our Bills, first or last, insert in the Decreet; nor the Answers thereto, tho it be the constant custome in such cases, alwayes to insert Bills and Answers as a part of the process: Which Fortifies or Weakens, as they are Granted, or Refused, And as to the Reason hereof, I leave it to the Judicious Reader, and will not take upon me to judge thereof, least it be reckoned to me for a second Crime; But come to the Bill it self: The first Representation bears, the Conference which past betwixt my Lord *Hercarse* and the Petitioner, when he first sent for him; And that albeit the Petitioner hastened the Agreement, *Inchdarnie* with concourse of his Father in Law, after the same was done, caused him dispone it to him for a 1000. Merks less than I had agreed for; He having a great Action depending in the Session, against my Lord *Annandale*, and knowing the great Figure *Hercarse* made among the Lords. As to what touching the first part of it, anent our Conference, it is believed *Hercarse* will not deny the Truth, of it himself, and there is no shaddow of a Calumnie in it. As to the 2d: part of it, That *Inchdarnie* caused him Dispone with concourse of his Father in Law, *&c.* We hope my Lord will not deny he was present, at the making of the Bargain, which if he do, we offer to prove it: And if he was present, all the World will conclude he came not there

there as a Cipher. Yea, we are free to ſay, any Man who knows him and his Son in Law both, ſpeaking his mind with any ingenuity, will conclude he was the chief Actor. That *Roſſyth* had a great Action depending before the Lords, againſt my Lord *Annandail*, is nottour; and I have often heard it of himſelf. And that *Hercarſe* made a great Figure among the Lords, is no leſs nottour. The Bill bears neither that my Lord promiſed to haſten his Action for the Bargain; nor to do him any good office whatſoever, but ſimplie relates the Truth as it was: And if my Lord himſelf makes any ſuch Applications, he may blame the witneſs within himſelf, and not the Ingiver of the Bill: Tho he believes it had been neither calumnie, nor reflecting upon my Lord, tho he had added, *Roſſyth having in his view the ſervice ſuch a Lord might do him, farr beyond the worth of* 1000. *Merks or two.* The ſecond Repreſentation is, That in an unuſual manner, he raiſed a Suſpenſion in the Tennants names, which was by them and the other alledged Chargers diſowned, which as we are informed, is not agreeable to Law. If it be uſual we deſire the Complainer to condeſcend but upon three caſes (which is the leaſt makes a perfect number) quadrating with this ſince the Erection of the Colledge of Juſtice, and we ſhall acknowledge it an Error, tho it would prove no calumnie; but a miſtake of the Form of Proceſs before the Lords. And if it be denyed, that it was diſowned by the Tennants, it is offered to be proven *ſcripto*; and the Anſwers given in to *Inchdarnies* Bill ſufficiently verifies, it was diſowned by one of the Chargers, and their carriage all along in the whole buſineſs. As to the third, That the Tennants put in a Bill, craving the Bill of Suſpenſion might be given up to them to be deſtroyed; or that *Inchdarnie* might be ordained to ſubſcribe the ſame before Witneſſes, and abide thereat. If it be denyed, their Bill is Extant to verifie it: And that it was not granted, is a Negative, and proves it ſelf, till the contrar be inſtructed. As to the Fourth Repreſentation, it is, that where in an Action for Mails and Duties it is enacted that the Defender produce ſuch a day, no Decreet can be pronounced, till an Act be Extracted, and called, yet without Extracting and calling an act, this Decreet was Pronounced: And as to the firſt part thereof, there is hardly a Pockbearer about the houſe, but will give Teſtimony to the Truth of it; and as to the ſecond, it is believed the ordinar will not deny he paſt a De-

erect upon the Bench; when there was no act extracted: tho' afterward he past it *de novo* upon as was alledged better Grounds: To which many others likewise were witnesses. The fifth Representation contains nothing, but an Abbreviat of the Dispute, and that my *Lord Herearse* compeared as Procurator for *Inchdairnie*: If it be denyed that *Herearse* compeared as Procurator, we are ready to prove it by many witnesses: That we proponed the Defence mentioned in the Bill, and gave in the replyes specified therein to *Herearse* his answers, we offer to prove it if denyed by *Herearse* his own oath, he being now but a private person, and the Declaration of my Lord *Drumcairn*. The last Representation is, that tho' we offered to compt and reckon without an order of Redemption it was not granted; And that we never had a sight of the Decreet *Herearse* proponed upon; For eleiding our Defence; That the Aprrysing was reduced, which we offer to prove by the oath of *Herearse* and the Declaration of my Lord *Drumcairn*, and that *Herearse* was still Procurator, for shame will not be denyed: Yea only Procurator in this Debate. And that it was a Practick without a Paralel, we also represented, which we shall acknowledge for an Error, but no Calumnie, when the contrair is instructed: We have seen a Lord come to the Barr, when his own cause was debating, but behaving himself with such Modesty, that hardly would he meddle in the Dispute, or any thing, unless it had been to inform in the matter of Fact, but referred all to his Advocats: But for a Lord to come to the Bar, and debate as Procurator for another man, is indeed that which we never either heard or saw, and as to the Precatory part which desires the Lords to consider the concussions, the overhailings, *&c.* It is answered, 1*st*. Tho therein there were something, which being insert in the Narrative might inferr Calumnie; Yet the scop of the Petitioning part, being meerly to desire the Lords to consider, if things be so and so, and to rectifie as they shall find cause: It would be very hard to declare upon a mistake here, the Petitioner to be guilty of Calumnie: There is never a Bill put in, which is a complaint, but craves something to be rectified, and consequently complains, at least Implicitly of Injustice; And if it be not in Terms sufficiently flattering, they must excuse me for this Error: I will not give Flattering Titles unto Man willingly, *least my Maker take me away suddenly*: *Job* 32. ver. 21. But 2*dly*, We believe we have

have ſufficiently inſtructed injurie, which in the largeſt ſenſe, is *quicquid ſit non jure*, overhailing, by precipitating Judgment, Illegalitie, and Informality, in carrying on the Action in a way unagreeable to the Laws of the Land: And that there was concuſſion is ſufficiently made out, in ſhewing the way, how *Inchdarnie* came to the Bargain, to which we now add: *My Lords* ingaging the *King's Advocat* in the cauſe, *unde abuſus eſt patronatu Cæſaris*; Labouring to make it a publick concernment, and his influencing the Ordinar ſo much to follow his Faith: Upon pretence of his great skill in Law, whom the Ordinar conceived to be of as great Ingenuity as himſelf. And if it be alledged that he could not *injicere terrorem*, in the Ordinar; who was of equal ſtation with himſelf, and *Cuſſing German* to my Lady *Errol*, a great Courtier in that day, by reaſon of Communon with the *Romiſh Church*. It is anſwered, granting that he was not only of equal ſtation with my *Lord Hercarſe*, but alſo that his Mountain was preſumed to ſtand ſtrong in that day; becauſe of his near Relation to my Lady *Errol* a Profeſſed *Papiſt*, by whoſe Moyan likewayes many believed he was preferred to his place; but all fear upon Concuſſion, is not a ſlaviſh fear whereof we judge my Lord *Drumcairn* was leaſt capable: but there might be a fear of being toped by *Hercarſe*, when matters came to be Debate in the *Inner-houſe*, and a fear of loſing his Friendſhip, with whom he was very Intimat. Neither is *Concuſſion* alwayes taken in ſo narrow a ſenſe, as importing only a ſlaviſh fear: *Cod: Tit: de Concuſſione lege 4. Jubemus atque hortamur ut ſi quis forte honoratorum de curionum poſſeſſorum poſtremo etiam colonorum, aut cujuſlibet ordinis a judice fuerit aliqua ratione concuſſus, ſi quis ſcit vænalem fuiſſe de jure Sententiam; ſi quis pœnam vel pretio remiſſam vel vitio cupiditatis injeſtam, ſi quis poſtremo quacunque de cauſa improbum judicem potuerit improbare is vel adminiſtrante eo, vel poſt adminiſtrationem depoſitam in publicum, prodeat crimen deferat delatum approbet cum probaverit & victoriam reportaturus & Gloriam.* To all which may be added, that while we ſpeak be way of complaint of my Lord *Hercarſe*; we ſpake againſt him not as a *Lord of the Seſſion*, but as *Inchdairnie* his Procurator, if a Lord of the Seſſion, ſhould be found in a *Plebeian* habit, in ſome baſe imployment, and meet with ſome afront which would be eſteemed ſuch to a Lord; but not to one of a vulgar ſtation, he could not complain that there were any injurie done, or a Lord were affronted: And therefore though

there were something in this Bill which might be quarrelled if done againſt a Lord: (which we cannot find) Sure there is nothing in it which might not have been laid, againſt a Procurator, and more alſo.

But poſſible it will be alledged, I am preſumed to be guilty, becauſe there was no Compearance for me, In anſwer to which it is to be conſidered, the order was that I ſhould compear on *Tueſday*, to anſwer to my Bill, (which whither it was publick or not I do not remember) which according to the Grammatical Conſtruction, and the letter, ſeems to be in my favours; for explaining and clearing ſomething in the Bill, and taken in this ſenſe; I might compear or not, as I thought good: For any man may renounce *jus ſuum*, but I ſoon found it was in the ſcope of it, to anſwer to *Hercarſe* his Accuſations, founded upon my Bill, in which caſe I was not tyed to compear: till Firſt, they had given me notice who was my Accuſer, 2*do*. The double of my Inditement, eſpecially it being founded upon write, and a Complex buſineſs. 3*tio*, I ought to have been Cited by a *Macer* or *Meſſengers at Arms*, none whereof were done: And therefore I was not bound to compear; And yet I did compear, and was ready to anſwer all the Forenoon, but they delayed the calling of it till the Afternoon; at which time I judged it no wayes my duty to compear, for theſe reaſons, 1*ſt*. In the Afternoon the Officers of State are Ablent, 2*do*. All the extraordinary Lords are abſent who were unconcerned in the Buſineſs: 3*tio*. It was impoſſible for me to get my Advocat whom I had conſulted, to attend in the Afternoon, in the cloſe of the Seſſion, he being a Gentleman of great Imployment; and it was uncertain whither they would call at 2. or 3. a Clock or at 6. or 7. at Night. So much for the Clamercus Bill, ſo called.

Within a few dayes after the riſing of the Seſſion, the Lords meeting for ſome concernment of their own, They recommended to the *Preſident* to agree the Civil Intereſt, and for that effect delayed the Execution of the Sentence, for my Impriſonment for a Moneth, with power to my Lord Preſident to prolong my Liberty if he ſhould find cauſe therefore. Hereupon we made an Addreſs to my Lord *Hercarſe*, to draw an Ablolute Submiſſion to my *Lord Preſident*, to do in the matter as he ſhould find juſt: To which *Hercarſe* chearfully condeſcended, being then in a tender frame, partly through the reſcent loſe of his Place, and partly through the ſickneſs

nels and death of his Daughter, who if Fame be not a falſe witneſs, was a Gentlewoman qualified with ſingular Induments: Whereupon we cauſed draw the Submiſſion and ſubſcrived it, I my ſelf and my wife, who was going out of the Town, *Hereaſe* having declared (becauſe *Inchdairnie* was not in Town) he would take burden for him. But it being uncivility to trouble him, while he was in *extremitate luctus*, we forbear for a time, and when we came to deſire he would ſubſcrive, found he was returned to his old Temper, and he reſiled, alledging a Communing would do the buſineſs, and when we told this to the *Preſident*, we found him of the ſame mind, and albeit I well knew a Communing would be to no purpoſe, yet that it might appear I was averſe from nothing which might effectuat Peace, I attended a moneth after the Seſſion rote; being in a very infirme and Valetudinarie condition, in which at length having obtained a meeting before the *Preſident*, I found nothing in his Comuning but Calumnniating my Perſon, and juſtifying all he had done: But concluding that they might get theſe Lands with a Bleſſing, he would give what the *Preſident* ſhould appoint. But not being ſatisfied with his rough diſcourſe, and knowing he might as well reſeill from the *Preſidents* determination by word, as he did from the Submiſſion: We parted without a Concluſion, only the *Preſident* ſaid, he would order his Decreet to be extracted, which accordingly was done.

This being done, *Inchdairnie* with *John Law*, *Hereaſe* his Servant, went alongſt the Tennents, and with many Threatnings and bigg Menacing words perſwaded them to take their Lands holden of him. But all in vain, their love to their old Maſters was ſo deeply rooted, that they would take of no other, till neceſſity forced them: Hereupon *Inchdairnie* in *July* thereafter charged them, to make payment of their Mails and Duties as he had lybelled them in his Bill of Suſpenſion; upon 15 days: But his Charge being given upon the 6. of *July*, they were denounced upon the 11. which was upon 5. days, all Regiſtrate at the *Horn*, and *Caption* taken out againſt them. Whereupon (as is informed) *Inchdairnie* was upon his way, to have taken all the Tennents, but his Father in Law knowing the groſſneſs of this Act, ſent over *Mr. Law* and ſtoped him. And to Palliate the Illegial Denunciation and Caption, which was taken out, he and his Guide abovementioned, came to the *Tennents*, and Threatned

ned them, if they brought not their Dutie to him, and that to his own house before the 15 days were expired, he should not leave them a Cock to crow Day: And (as is informed) his Father in Law took the *Messenger* to the *President*, who being a poor man took all the fault upon himself; giving an Excuse therefore, not worthy of the writing, and far less of an Answer. But one thing was forgotten by them both, the same *Messenger* was thereafter imployed to apprehend the *Tennents*, which no rational man being free of the guilt, would have done; he being so gross a *Criminal*, untill he had either been Purged, or Punished. But the *Tennnents* finding that the charge it self was judged Illegal, by several Writers to the *Signet*, it being but in effect a general preferrence, and a Declarator of *Inchdairnies* right, a Bill was put in to the Lords, complaining upon the writter, who had raised such a Horning, they being charged particularly, for the Sumes as *Inchdairnie* had lybeled them. To which the answer was, *finds the Writter has done no wrong*: Hereupon the Fifteen dayes being near expired, a Bill was put in in the Tennents names, for a Suspension, as the last remeed, whereof the reasons were. *1st*. The generality of the Charge (for the Charger disowned the particular Charges given by the *Messenger*.) *2do*. There was no Liquidation, tho some of their Duties were partly Victual. *3tio*, There was no probation of the quantities. *4to*. There were several others not called, who had an Interest, *viz*. The Superior for the few Duties, and the Minister, and School-master for their Stipends: Which Bill was given up to see, and kept up till the last day of the Session, that in case there were any necessity for it, all remeed might be cut off. The reasons were unquestionably Relivant, and passing by the last, the 3 first were instantly proven being Negatives; all that ever saw it concluded, it could not be refused, but if it had been past, it would have cost *Hercarse* a second Bellum, and it was too strong to be refused. A new course is invented, for fortifying *Inchdarnies* Decreet, (whether by *Hercarse* his contrivance or not, we leave it to the Reader to judge.) The *Lords* ordained the Tennents to compear in time of Vacance, *viz*. Betwixt and the 15 of *August*, before my *Lord Castlehill*, and depone anent the species and quantities who had no Tacks: and such as had tacks to produce, and restricked the Chargers diligence, to what upon Oath they should depone, and to what was contained in their

their Tacks who had any. Which Sentence is never drawn in an Act, Extracted and Read out of the Minut-Book, to put the Tennents in *Mala fide*; But Writen by the Clerk upon a Lords Direction, several dayes after the rising of the *Session*: Yea so close it was in the carrying of it on, that the Gentleman who was Agent in the cause, having inquired of it at the Clerk, he told him he could not tell him what it was, nor could I my self by any inquiry, have certainty in the matter, till I came to my Lord *Castlehill*, hearing it surmised, it was referred to him as it was indeed. Hereupon the Tennents did compear, and produced there Tacks and Deponed: Only two sent Testificats subscrived by the Minister, and four Elders, witnessing that in regard of their great Age they were not fit for Travel, the one being upwards of Fourscore years, and the other being near about this Age: Which was not sustained because it wanted *Soul* and *Conscience*, concerning which we shall only say this much, that albeit it be ordinar, in Testificats under the hands of Physicians and Chirurgions, to require they be upon Soul and Conscience: It was never required in a Testificat, concerning a Mans Age, for if so the Testifiers themselves must be about a Hundred; which is rare in this Age: For he cannot give *rationem scientiæ* till he be Fourteen; and secondly they must have been witnesses either to his Birth or Baptism 80 years agoe. But we leave thir tickliſh questions to my Lord *Hercarse* to solve. The Tennents having some deponed, and some produced their Tacks, *Inchdairnie* denunced them registrate and took out Caption *de novo*, and upon the 21 of *August* the same Messenger, at his instance apprehended the Tennents; being ten in number, whereof two were the old men abovementioned, and incarcerat them in the Tolbooth of *Dunfermling*: Where they continu'd Prisoners ten dayes, being the time of Harvest: till they were forced to pay him their Dueties; such as could get Money, and such as could not to give Bond, or find Caution, as also after they had agreed for their Duetie, he forced them to take a three years Tack of him, or else threatned them to return them again to Prison.

How the Lords will relish this diligence, before advising of the Tennents oaths, and a Declaration judicial what was contained in their Tacks, time will declare hereafter: But we believe upon impartial Examination, it will be found a clear Spulzie, and also a breach

breach of Arrestment, there being two Arrestments layed on upon the Mails and Duties, which were not looked by *Inchdairnie*, till the Tennents were brought Prisoners to the Town of *Dunfermling*. The Chancellour his Over-awing power being now gone with himself, tho' not long since, *Inchdairnie* spread out his kindly Letter to him, before the Tennents in *Tillycoultry*, to terrifie them by his Authority.

FINIS.